

**ORIGINAL**

IN THE UNITED STATES  
COURT OF FEDERAL CLAIMS

**FILED**

**JUL 29 2013**

U.S. COURT OF  
FEDERAL CLAIMS

HIGH HOPE FARMS, LLC, SK ENTERPRISES  
OF NORTH FLORIDA, INC., BUTLER FARMS,  
INC., TWO FEATHERS FARMS, INC., QUALITY  
PRODUCE, LLC, DAN JONES, CIRCLE C  
PRODUCE, LLC, JUNIPER TOMATO GROWERS,  
INC., JWM FARMS, LLC, FRED J. JACKSON,  
d/b/a JACKSON FARMS, FLOWERS FARMS,  
LLC, PATTERSON FARM, INC., HOPKINS  
FARMS, LLC, MOBLEY GREENHOUSE  
INVESTMENTS, LLC, GREGORY ENTERPRISES,  
LLC, TOWNSEND BROTHERS FARMS, INC., and  
DALE MURRAY and GREG MURRAY, d/b/a  
MURRAY FARMS,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

**13-519 C**

Case No. \_\_\_\_\_

CLASS ALLEGATIONS

**COMPLAINT**

The plaintiffs HIGH HOPE FARMS, LLC, SK ENTERPRISES OF NORTH FLORIDA, INC., BUTLER FARMS, INC., TWO FEATHERS FARMS, INC., QUALITY PRODUCE, LLC, DAN JONES, CIRCLE C PRODUCE, LLC, JUNIPER TOMATO GROWERS, INC., JWM FARMS, LLC, FRED J. JACKSON, d/b/a JACKSON FARMS, FLOWERS FARMS, LLC, PATTERSON FARM, INC., HOPKINS FARMS, LLC, MOBLEY GREENHOUSE INVESTMENTS, LLC, GREGORY ENTERPRISES, LLC, TOWNSEND BROTHERS FARMS, INC., and DALE MURRAY and GREG MURRAY, individually and doing business as MURRAY FARMS (collectively, "The Tomato Farmers", herein), for themselves and on behalf of a class of others similarly situated,

sue defendant THE UNITED STATES, and allege:

### **COUNT I - INDIVIDUAL TAKINGS ACTION**

1. This is an action seeking just compensation under the Fifth Amendment Takings Clause of the United States Constitution, arising under the laws and Constitution of the United States, and seeking money damages against the United States. This Court has exclusive jurisdiction over this Takings Clause action under the provisions of Title 28 Section 1491(a)(1).

2. The Tomato Farmers are (and were during 2008) natural persons, companies, and corporations which were producers, distributors, or sellers of fresh tomatoes having their places of business in the Southeast United States and selling and distributing fresh tomatoes throughout the States of Georgia, Florida, North Carolina, and South Carolina, and elsewhere throughout the United States. The Tomato Farmers' claims are joined herein, in that right to relief asserted by them arises out of the same transaction or occurrence or series of transactions or occurrences, and questions of law or fact common to all of The Tomato Farmers will arise in the action and will predominate over The Tomato Farmers' valuation and damages issues.

3. The Food And Drug Administration ("FDA" herein) is an agency or instrumentality of the defendant UNITED STATES and is the agency responsible for administering the statutes and regulations and issuing the public warnings, news releases and media briefings which are the subject of this case.

4. The mission of the FDA is, among other things, the "protecting [of] the public health by assuring the safety, efficacy and security of human and veterinary drugs,

biological products, medical devices, our nation's food supply . . . ." According to the FDA,

The Food and Drugs Act of 1906 was the first of more than 200 laws that constitute one of the world's most comprehensive and effective networks of public health and consumer protections. . . . Today, the FDA regulates \$1 trillion worth of products a year. It ensures the safety of all food except for meat, poultry and some egg products . . . .<sup>1</sup>

5. In particular, the FDA has the authority under Title 21 U.S.C. Section 375(b), to ". . . cause to be disseminated information regarding food, drugs, devices, tobacco products, or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer."

6. The authority of the FDA to issue public warnings such as the ones in this case is discretionary with the agency. As a result, the agency is typically immune from tort liability related to such warnings under applicable federal case law and Title 28 U.S.C. §2680(a) (the immunity provision of the Federal Tort Claims Act). The defendant has, accordingly, recently taken the position that the UNITED STATES and the FDA cannot be held liable in tort for the issuance of such public warnings in general or, in particular, with respect to tomatoes at the time of the 2008 Salmonella outbreak.<sup>2</sup>

7. Between April 23 and June 1, 2008, there were 57 reported cases of salmonellosis caused by *Salmonella* saintpaul in New Mexico and Texas, including 17 hospitalizations. On June 3, 2008, the FDA published a news release on its website in

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<sup>1</sup> See the U.S. Food and Drug Administration's website at [www.fda.gov](http://www.fda.gov).

<sup>2</sup> See, for example, the motion to dismiss filed by the United States in *Williams Farms Produce Sales, Inc. v. United States*, Case No. 2:11-01399 pending in the United States District Court for the District of South Carolina, entry 7-1, pages 11-15.

which it alerted consumers that a Salmonellosis outbreak (*Salmonella saintpaul* variety) appeared to be linked to consumption of certain raw, red tomatoes. Although the June 3, 2008, news release “alerted” consumers in New Mexico and Texas, the news release reported illnesses and hospitalizations in Illinois, Arizona, Colorado, Indiana, Kansas, and elsewhere throughout the United States.

8. In particular, in its June 3, 2008, news release, the FDA noted that, while “the source of the contaminated tomatoes may be limited to a single grower or packer or tomatoes from a specific geographic area”,

FDA also recognizes that there are many tomato crops across the country and in foreign countries that are just becoming ready for harvest or will become ready in the coming months. In order to ensure that consumers can continue to enjoy tomatoes that are safe to eat, FDA is working diligently with the states, the Centers for Disease Control and Prevention, the Indian Health Service, and various food industry trade associations to quickly determine the source and type of the contaminated tomatoes.

The news release then explicitly identified the States of Virginia and Florida as states where the FDA was working to reduce the incidence of “food-borne illness”. See the June 3, 2008, news release, exhibit 1 attached to the complaint.

9. On June 7, 2008, by an updated news release, the FDA expanded its warning to consumers “nationwide”, regarding red plum, red Roma, and red round tomatoes. A copy of the June 7, 2008, news release is attached to the complaint as exhibit 2. The states reporting illnesses had grown significantly, to include Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, New Mexico, Oklahoma, Oregon, Texas, Utah, Virginia, Washington, and Wisconsin.

10. In its June 7, 2008, news release (exhibit 2), the FDA indicated to consumers that tomatoes grown and harvested in certain states, including Georgia, had not yet

been associated with the outbreak. However, the news release provided no information to consumers regarding how to distinguish between fresh tomatoes which were grown in one location and processed (boxed for marketing) in another. Moreover, the news release contained no indication that tomatoes grown and harvested in those states would not, in the future, be associated with the Salmonella outbreak. Rather, the June 7, 2008, news release stated that the FDA was still attempting to identify the source of contamination, but had not yet done so.

11. In response, national news media reported a link identified by the FDA between fresh, raw tomatoes and Salmonella poisoning in 16 states and specifically noted the FDA's observation that salmonellosis "was not something that you would want" to suffer.<sup>3</sup>

12. At its nationally-broadcast media briefing<sup>4</sup> held on June 13, 2008 (a copy of the transcript of which is attached as exhibit 3), the FDA indicated expressly that Florida remained an area of concern for tracing back the contaminated tomatoes, as of that date. As to the question of how consumers were to distinguish between tomatoes grown in "safe" regions and those which were not, the FDA representative indicated

We've had questions about how will consumers know. We recognize that it may not be immediately obvious to consumers when they're in a restaurant or even in a store where the tomatoes have come from. And our advice is to ask the restaurateur, the retailer, the food service outlet, because retailers and restaurateurs have an obligation to know their

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<sup>3</sup> An example of this is information contained in a USA Today article of June 9, 2008.

<sup>4</sup> The FDA's media briefing of June 13, 2008, included representatives of nationwide new outlets, including, but not limited to, USA Today, Bloomberg News, and CNN.

suppliers.

However, the FDA representative indicated that the “vast majority” of the tomatoes at the time of the outbreak were “very likely” from New Mexico and Florida.

13. In addition, in the media briefing, the FDA representative acknowledged that tomatoes grown and harvested in one location might be shipped some distance to be processed in a packing house elsewhere, and that the packing house, rather than the farm, might be the source of contamination. As a result, those listening to the briefing would have reasonably been left with the conclusion that, although tomatoes might have been grown in an area that had not yet been implicated, those same tomatoes packed elsewhere might be suspect, or, conversely, that “safe” processing houses might be the recipients of “unsafe” tomatoes grown in suspect areas.

14. Notwithstanding the FDA’s attempts to distinguish between “safe” tomatoes and suspect products, the FDA representative acknowledged that consumers would not typically make that distinction:

And it's often difficult because consumers will just see salmonella, tomatoes, don't want to go there. They do not - they don't go beyond that. And right from the start here we've tried to provide more specific information, and that's one of the reasons we're doing these press calls. I'm constantly repeating what the consumer message is so that you all can help us get the word out that it isn't (full) tomatoes, because you're right – the big aspects of the industry that are taking an economic hit because of this. And that's certainly not our goal.

15. The general public’s inability or unwillingness to make the distinction between “safe” tomatoes and those which fell within the strictures of the FDA’s warnings was subsequently demonstrated, in that the specifics of the warnings are generally misunderstood or disregarded.

16. Ultimately, only as of July 17, 2008, did the FDA issue its news release indicating that the results of its investigation exculpated fresh tomatoes then available from domestic United States farms and rather implicated raw jalapeno and raw serrano peppers. A copy of that July 17, 2008, new release is attached as exhibit 4. Until that date, fresh tomatoes remained among the possible causes of the Salmonella outbreaks which had been targeted by the FDA and its warnings. Even after July 17, 2008, a significant portion of the American public remained unsure as to the safety of fresh tomatoes for consumption.

17. However, as a result of the widespread publicity attendant to the FDA's warnings and briefings and the indistinct identification of which tomatoes or production regions which were "safe" for consumers, as of June 3, 2008, nationwide retailers (such as WalMart and McDonalds) began stopping their ordinary purchases of all red plum, red Roma, and red round tomatoes, thereby affecting the market as a whole.

18. That widespread publicity and resulting radical reduction in purchase and consumption occurred at almost precisely the time that The Tomato Farmers were harvesting, packing, and placing their tomatoes into the stream of commerce, thereby leaving The Tomato Farmers with all or substantially all of their crops unsold and incapable of being marketed profitably. The Tomato Farmers soon thereafter lost all of the value of their remaining unsold crops, because of the adverse publicity arising out of the FDA warnings and the resulting reduction in consumption of red plum, red Roma, and red round tomatoes, resulting in their unmarketability.

19. As a result of the indefinite nature of the FDA's warnings, while the Salmonella contamination was never found in tomatoes grown or processed in Georgia

or Florida or, for that matter, in tomatoes grown or processed anywhere in the United States, the perception of the general public was that all tomatoes were affected by the warning, thereby adversely affecting growers throughout Georgia, Florida, Alabama, Louisiana, Tennessee, North Carolina and South Carolina.

20. Diminished demand for spring 2008 and later crop tomatoes resulted from the general FDA tomato warning. For example, approximately 32% of the Georgia tomatoes grown for the Spring 2008 crop window were simply left in the fields, because of a decreased market demand resulting from the FDA's warning program. Another substantial portion of the crops of The Tomato Farmers, although already picked, were simply dumped or abandoned or were sold for salvage prices.

21. Moreover, prior to the FDA's publications, the general market price of Georgia tomatoes (for example) was in the \$18-19 per box range, while after the FDA's publications, that market price dropped to less than \$4 per box (which is generally less than the cost of harvesting, processing, packaging, and shipping to market), and, in some cases with some Florida producers, \$.50 to \$1 per box. Because of this, it rapidly became economically unfeasible to distribute the remaining tomatoes in the southeast United States because of the market impact from the FDA warnings.

22. In Georgia alone, total production losses in the state were in the range of \$13.9 million for grower expenses for 2008 tomatoes harvested and packed, but not sold, an additional \$1.6 million loss in farmer net income, and a decreased output impact totals \$11.8 million, combined with the decline in tomato sales, for an estimated total economic output decrease in the Georgia tomato economy of \$25.7 million.

23. Similarly, in Florida, conservative estimates place the total loss to Florida



farmer only (and not including agricultural workers, distributors, and retailers) at more than \$100 million, and total losses to all affected parties at more than \$300 million.

24. The timing of the FDA's warnings thus burdened tomato farmers in the southeast United States in a disparate manner, depending upon the readiness of the crops at the time of the progressive market effects of the FDA warnings, thereby depriving The Tomato Farmers and others similarly situated in the southeast United States of all or substantially all of the economic benefit of their Spring 2008 tomato crops.

25. Ultimately, the FDA determined that The Tomato Farmers' tomatoes were not the source of the Salmonella outbreak. In fact, the Salmonella outbreak was found to have originated elsewhere in raw pepper products processed outside of the United States.

26. The actions taken by the FDA in issuing its warnings were within the proper and legal scope and authority of the FDA's public role, for the purpose of protecting the public health in general, and not because of any defect in The Tomato Farmers' tomatoes or to prevent the distribution of "nuisance" or diseased food products. The Tomato Farmers' products remained a valuable and healthy food product, although rendered unmarketable because of the FDA's warnings.

27. The FDA's issuance of public health warnings directed specifically against red plum, red Roma, and red round tomatoes and particularly involving those tomatoes associated with the southeast United States production, resulting in the general public refusal to purchase The Tomato Farmers' product, was a taking of The Tomato Farmers' tomato crops for a valid public purpose, namely, the preservation of public

health against a possible widespread salmonellosis epidemic during the FDA's investigatory phase regarding the 2008 Salmonella outbreak.

28. However, as a result of the FDA's lawful actions in the issuance of the public warnings, The Tomato Farmers (and others similarly situated) have been deprived of their property, namely, their Spring 2008 tomato crops which were harvestable or already harvested (then or in the near future) or ready to be harvested, packed and sold. The Tomato Farmers (and others similarly situated) were deprived of all of the economic value and use of portions or all of their Spring 2008 red plum, red Roma, and red round tomato crops, even though those crops were healthy produce and were otherwise not adulterated or diseased.

29. Moreover, while the coincidental timing of the FDA's warnings allowed other Spring 2008 tomato growers in earlier production windows to harvest, pack and market all of their tomatoes, these Tomato Farmers (and others similarly situated), because of the later timing of their production and opportunity for harvest, packing and marketing of The Tomato Farmers' tomatoes (and others similarly situated), were deprived of that same opportunity. As a result, the burden of the FDA's warnings fell disparately on these Tomato Farmers and others similarly situated.

30. The reasonable investment-backed expectations of The Tomato Farmers (and others similarly situated) with respect to their Spring 2008 tomato crops could not and did not take into account that the FDA would or could issue warnings affecting the market for Spring 2008 tomatoes based on a Salmonella outbreak occasioned by disease in other unrelated products from another country (raw peppers from Mexico).

31. The values of those crops and the losses for the respective Tomato Farmers

are set forth on the attached exhibit 5, for which values and losses (plus prejudgment interest from the dates of loss or taking) The Tomato Farmers seek compensation in this action under the Takings Clause of the Fifth Amendment to the United States Constitution.

32. The Tomato Farmers have retained the undersigned counsel to represent them herein. The defendant is obligated to pay a reasonable fee to The Tomato Farmers' counsel herein and all costs, as a result of the taking.

WHEREFORE, The Tomato Farmers demand judgment against defendant for damages, plus prejudgment interest from the dates of loss or taking, and for the assessment of attorney fees and the costs of this action.

## **COUNT II - CLASS ACTION**

33. The plaintiffs reallege and incorporate by reference all of the allegations of paragraphs 1-32 above, as if fully set out herein.

34. The proposed class consists of:

All producers of red plum, red Roma, and red round tomatoes for the Spring 2008 tomato crops in the States of Georgia, Florida, Alabama, Louisiana, Tennessee, North Carolina and South Carolina.

35. The proposed class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the proposed class; the claims of the Plaintiffs are typical of the claims of the proposed class; and the Plaintiffs will fairly and adequately protect the interests of the proposed class.

35. Plaintiffs further state that, in addition to the prerequisites for a class being met, a class action is also maintainable pursuant to F.R.C.P. Rule 23(b).

WHEREFORE, plaintiffs respectfully request certification of the class as identified herein and a monetary judgment in favor of plaintiffs and class members representing the full fair market value of the property taken by the United States on the date it was taken, plus prejudgment interest from the dates of loss or taking, and for costs and attorneys' fees incurred by plaintiffs and the class and for such other and further relief as this Court may deem just and proper.

  
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## News & Events

### FDA NEWS RELEASE

#### FOR IMMEDIATE RELEASE

June 3, 2008

#### Media Inquiries:

Michael Hemdon, 301-827-6242

#### Consumer Inquiries:

888-INFO-FDA

### FDA Warns Consumers in New Mexico and Texas Not to Eat Certain Types of Raw Red Tomatoes

The Food and Drug Administration is alerting consumers in New Mexico and Texas that a salmonellosis outbreak appears to be linked to consumption of certain types of raw red tomatoes and products containing raw red tomatoes. The bacteria causing the illnesses are *Salmonella* serotype Saintpaul, an uncommon type of *Salmonella*.

The specific type and source of tomatoes are under investigation. However, preliminary data suggest that raw red plum, red Roma, or round red tomatoes are the cause. At this time, consumers in New Mexico and Texas should limit their tomato consumption to tomatoes that have not been implicated in the outbreak. These include cherry tomatoes, grape tomatoes, tomatoes sold with the vine still attached, and tomatoes grown at home.

*Salmonella* can cause serious and sometimes fatal infections particularly in young children, frail or elderly people, and those with weakened immune systems. Healthy persons often experience fever, diarrhea (which may be bloody), nausea, vomiting, and abdominal pain. In rare circumstances, the organism can get into the bloodstream and produce more severe illnesses. Consumers in New Mexico and Texas who have recently eaten raw tomatoes or foods containing raw tomatoes and are experiencing any of these symptoms should contact their health care provider. All *Salmonella* infections should be reported to state or local health authorities.

From April 23 through June 1, 2008, there have been 57 reported cases of salmonellosis caused by *Salmonella* Saintpaul in New Mexico and Texas, including 17 hospitalizations. Approximately 30 reports of illness in Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, and Utah are currently being investigated to determine whether they are also linked to tomatoes. There are no reported deaths.

FDA recognizes that the source of the contaminated tomatoes may be limited to a single grower or packer or tomatoes from a specific geographic area. FDA also recognizes that there are many tomato crops across the country and in foreign countries that are just becoming ready for harvest or will become ready in the coming months. In order to ensure that consumers can continue to enjoy tomatoes that are safe to eat, FDA is working diligently with the states, the Centers for Disease Control and Prevention, the Indian Health Service, and various food industry trade associations to quickly determine the source and type of the contaminated tomatoes. As more information becomes available, FDA will update this warning.

Last year FDA began a multi-year Tomato Safety Initiative to reduce the incidence of tomato-related foodborne illness. The Initiative is a collaborative effort between FDA and the state health and agriculture departments in Virginia and Florida, in cooperation with several universities and members of the produce industry.

A key element of the Food Protection Plan — a scientific and a risk-based approach to strengthen and protect the nation's food supply — is prevention. FDA encourages producers to critically reexamine their operations and apply the scientific principles and regulations established decades ago to provide a safe product for the consumer.

Information on safe handling of produce can be found at [www.cfsan.fda.gov/~dms/prodsafe.html](http://www.cfsan.fda.gov/~dms/prodsafe.html).

Tomato consumer page can be found at <http://www.fda.gov/oc/opacom/hottopics/tomatoes.html>

Updates from the Centers for Disease Control and Prevention can be found at <http://www.cdc.gov/>

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### News & Events

#### FDA NEWS RELEASE

This release was revised on June 8, 2008 to include Hawaii to the list of states **not** associated with this outbreak.

#### FOR IMMEDIATE RELEASE

June 7, 2008

#### Media Inquiries:

Kimberly Rawlings, 301-827-6253

#### Consumer Inquiries:

888-INFO-FDA

### FDA Warns Consumers Nationwide Not to Eat Certain Types of Raw Red Tomatoes

The Food and Drug Administration is expanding its warning to consumers nationwide that a salmonellosis outbreak has been linked to consumption of **certain** raw red plum, red Roma, and red round tomatoes, and products containing these raw, red tomatoes.

FDA recommends that consumers not eat raw red Roma, raw red plum, raw red round tomatoes, or products that contain these types of raw red tomatoes **unless** the tomatoes are from the sources listed below. If unsure of where tomatoes are grown or harvested, consumers are encouraged to contact the store where the tomato purchase was made. Consumers should continue to eat cherry tomatoes, grape tomatoes, and tomatoes sold with the vine still attached, or tomatoes grown at home.

On June 5, using traceback and other distribution pattern information, FDA published a list of states, territories, and countries where tomatoes are grown and harvested which **have not been associated with this outbreak**. This updated list includes: Arkansas, California, Georgia, Hawaii, North Carolina, South Carolina, Tennessee, Texas, Belgium, Canada, Dominican Republic, Guatemala, Israel, Netherlands, and Puerto Rico. The list is available at [www.fda.gov/oc/opacom/hottopics/tomatoes.html#retailers](http://www.fda.gov/oc/opacom/hottopics/tomatoes.html#retailers). This list will be updated as more information becomes available.

FDA's recommendation does not apply to the following tomatoes from any source: cherry, grape, and tomatoes sold with the vine still attached.

FDA recommends that retailers, restaurateurs, and food service operators not offer for sale and service raw red Roma, raw red plum, and raw red round tomatoes unless they are from the sources listed above. Cherry tomatoes, grape tomatoes, and tomatoes sold with the vine still attached, may continue to be offered from any source.

Since mid April, there have been 145 reported cases of salmonellosis caused by *Salmonella* Saintpaul nationwide, including at least 23 hospitalizations. States reporting illnesses linked to the outbreak include: Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, New Mexico, Oklahoma, Oregon, Texas, Utah, Virginia, Washington, and Wisconsin. *Salmonella* Saintpaul is an uncommon type of *Salmonella*.

*Salmonella* can cause serious and sometimes fatal infections particularly in young children, frail or elderly people, and those with weakened immune systems. Healthy persons often experience fever, diarrhea (which may be bloody), nausea, vomiting, and abdominal pain. In rare circumstances, the organism can get into the bloodstream and produce more severe illnesses. Consumers who have recently eaten raw tomatoes or foods containing raw tomatoes and are experiencing any of these symptoms should contact their health care provider. All *Salmonella* infections should be reported to state or local health authorities.

FDA recognizes that the source of the contaminated tomatoes may be limited to a single grower or packer or tomatoes from a specific geographic area. FDA also recognizes that there are many tomato crops across the country and in foreign countries that will be ready for harvest or will become ready in the coming months. In order to ensure that consumers can continue to enjoy tomatoes that are safe to eat, FDA is working diligently with the states, the Centers for Disease Control and Prevention, the Indian Health Service, and various food industry trade associations to quickly determine the source of the tomatoes associated with the outbreak.

FDA is taking these actions while the agency continues to investigate this outbreak with state and federal partners. Such actions are a key component of FDA's Food Protection Plan, a scientific and risk-based approach to strengthen and protect the nation's food supply.

FDA will continue to issue updates as more specific information becomes available.

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Information on safe handling of produce can be found at <http://www.cfsan.fda.gov/~dms/prodsafe.html>

Tomato consumer page can be found at [www.fda.gov/oc/opacom/hottopics/tomatoes.html](http://www.fda.gov/oc/opacom/hottopics/tomatoes.html)

Updates from the Centers for Disease Control and Prevention can be found at [www.cdc.gov/](http://www.cdc.gov/)

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**Transcript for FDA Media Briefing**  
**Salmonella Outbreak Involving Certain Type of Tomatoes**  
**June 13, 2008**

Coordinator: Welcome and thank you for standing by. At this time all participants will be able to listen only until the question and answer session of the conference. At that time if you would like to ask a question, you may do so by pressing star one. And please state your name and organization at that time.

Also today's conference is being recorded. If anyone has any objections, you may disconnect at this time. Now I will turn the meeting over to Mr. Michael Herndon. Sir, you may begin.

Michael Herndon: Thank you (Gwennie). Thank you and - thank you very much and ladies and gentlemen welcome. I am Michael Herndon with FDA's media relation staff. Thanks and welcome to today's briefing on salmonella in tomatoes investigation.

We have one speaker today from the Food and Drug Administration and one subject expert from the Centers for Disease Control and Prevention. We also have several FDA officials here to answer any questions later in this briefing.

Today's speaker is Dr. David Acheson, Associate Commissioner for Foods with the FDA. Our subject expert from CDC is Miss Patricia Griffin, Chief Enteric Diseases Epidemiology Branch. Our FDA subject experts today are Michael Rogers, Director Division of Field Investigations, John Guzewich, Senior Environmental Health Science -- Scientist, excuse me -- and Matthew Eckel, Director Office of the Americas. And that's in FDA's International Programs Office.

We'll have a brief Q&A -- a question and answer segment -- after the opening remarks, but at this time I'm going to turn this over to Dr. David Acheson.

David Acheson: Good afternoon everybody. This is David Acheson, Associate Commissioner for Foods at FDA. Not a great deal of information that's new to share with you, but there are some important points and some updates that I want to provide with regard to what FDA is doing.

Firstly, just to thank Dr. Patricia Griffin from CDC for being on this call with us. There are no specific updates from CDC today. The numbers are as they were yesterday, which were 228 cases in 23 states. So today's numbers are the same as yesterdays simply because they have not been further updated.

With regard to the trace back of this - of the contaminated product, we are not yet at a point where we definitively know (unintelligible) of an area. There are multiple tracks of trace backs that are currently occurring at this point in time. And what I mean by that is that each track of a trace back begins with talking to a patient determining what type of tomatoes they ate and where they purchased it in the timeframe that fits with the onset of the illness.

I'm working back, as I've described in the previous two calls, to the retail store, the suppliers, the distributors, the importers. And each one of those tracks can lead in multiple different directions, often 20 or 30 different lines that we're pursuing at the same time. And we have got half a dozen or so of those going on at any one time.

One of the questions that came up yesterday, which I think is pertinent to repeat, is why does it take so long. And these - doing these trace backs through these multiple channels are very time consuming and complex,



because we literally have to get the invoices and the information to ensure that they're accurate.

And for example we were almost all the way through one when one of the patients that we had used, basically decided that it was not the Roma tomatoes that she had eaten; it was the red round tomato. So we had to start from scratch on that one.

Point is that the tracing is, as ever, complex. We've talked before about the two specific complexities around tomatoes. We are getting closer, but as of yet there is no specific geographic location identified.

FDA did update the website last night with more areas in the United States that were excluded, in so much that they were not producing tomatoes at the time that this outbreak occurred or is occurring. Or if they were, that distribution was of a different pattern, or they were producing tomatoes that were not associated with the illness. So that was updated.

It will be further updated tonight based on the information that is coming to FDA today. So again, you could find that information on FDA's website, which is [www.fda.gov](http://www.fda.gov) with a link on the front page there to the salmonella outbreak.

I want to mention briefly, simply because we've had a lot of questions around this, and that is the status of what is going on in Florida. I'm not wanting to put the focus on Florida specifically, but this is an opportunity for us to explain what the status of Florida is, because it is a little complicated.

When this outbreak began, the central or southern - and southern parts of Florida were producing tomatoes that were distributed in the same regions

where we have seen illness. And so for that reason Florida was obviously an area that was a question as to whether any of these tomatoes were tracing back to Florida. And that is still the status. We have - we still are not sure for certain whether or not these contaminated tomatoes originated from either the central or southern part of Florida.

The northern part of Florida was not harvesting at the time the outbreak began, but is now. The northern part of Florida is now harvesting, so they applied for exclusion. And FDA reviewed how they were going to differentiate northern tomatoes from others, and we're satisfied that that was going to work. So the Northern part of Florida is producing tomatoes - harvesting tomatoes now that are going out into the stores.

It is a little complex in Florida simply because there's different parts of the state that are in different states - different stages of this outbreak investigation.

I want to just mention that aside from the trace back, FDA has stepped up its sampling of tomatoes. We're doing this on both domestically grown tomatoes and imported tomatoes. To date we have had no positives, but there has been a significant increase in the sampling of tomatoes.

Typically when we do this we don't necessarily find a positive based on this sort of sampling strategy, but we feel it's important to do this because it does certainly raise the possibility that if there is an ongoing problem we'll find it. But it - but as I've said, typically this does not give us the answers that we need in terms of determining the origin, but it's an important part of insuring that the intervention controls are working.

The final message again is just to reiterate the message to consumers here. There are plenty of safe tomatoes that are out on the - in the stores right now.

Right from the beginning, the grape, the cherry, and those tomatoes that are still attached to the stalks have been safe. They never were incriminated with the outbreak, so that's important message number one.

Second is that the tomatoes that were incriminated with the outbreak were the Roma, the plum, and the red round. And as before, as the message yesterday and the day before, if those tomatoes are coming from growing areas that are on our exclusion list, then they are not part of the outbreak and are safe to consume.

We've had questions about well how will consumers know. We recognize that it may not be immediately obvious to consumers when they're in a restaurant or even in a store where the tomatoes have come from. And our advice is to ask the restaurateur, the retailer, the food service outlet, because retailers and restaurateurs have an obligation to know their suppliers.

And we have been in active conversations with the industry, essentially emphasizing that message of the importance of them knowing their suppliers so they can communicate that to consumers. So with that, Mike I'll hand to back to you for some questions.

Michael Herndon: Okay. Thank you Dr. Acheson. At this time ladies and gentlemen we'll take your questions. To be fair to everyone please limit yourself to one question and one follow up. And please state your name and affiliation. We'll take the first question.

Coordinator: You first question comes from Elizabeth Weise at USA today. Your line is open.

Elizabeth Weise: Hi. Thanks for taking my call. Hey, a question on the beginnings of this. I know that the first cluster that was identified was in New Mexico, but the first case -- and I believe it was Dr. Williams from CDC yesterday -- said it was on April 10. Where did that -where was that and when was it identified, if you know.

David Acheson: Dr. Griffin, are you able to address that?

Patricia Griffin: I don't have that information at the tip of my fingers. I'm sorry. The initial cases were in Texas and New Mexico, and that's where the initial investigation was. But the exact location of that - the very first person on our list, I don't have at my fingertips.

Elizabeth Weise: Can I call CDC later and get that?

Patricia Griffin: We may have that. We can see.

Elizabeth Weise: Okay. Thanks.

Michael Herndon: Did you have a follow up, Elizabeth?

Patricia Griffin: No, that's fine.

Michael Herndon: Great. Thank you. Next question please.

Coordinator: Your next question comes from Justin Blum, Bloomberg News. You may ask your question.

Justin Blum: Hi. Thanks for taking my question. I'm told that nine patients who developed salmonella in two restaurants the same chain. Can you say which chain that

was and where the restaurants were located and what that means to the investigation?

David Acheson: This is David Acheson from FDA. No, we're not able to publicly put out there the name of the restaurant or the specific location. But what I can say is that that obviously represents a small cluster within this outbreak, and that information has formed one of the tracks of the trace back.

So figuring out where those tomatoes came from that left the illness in those nine patients clearly is - that's one of the tracks on the trace back. But I'm not able to give you the name of the chain or the geographic location.

Justin Blum: If I could just ask a follow up -- what's the reason you can't say even the state or the name of the chain?

David Acheson: At this point because of the fact that it's an active investigation and it would not be appropriate to name a chain or a state. That is confidential information that is part of an ongoing investigation.

Justin Blum: Okay. Thank you.

Michael Herndon: Thanks, Justin. Next question please.

Coordinator: Your next question comes from Louise Schiavone of CNN. Your line is open.

Louise Schiavone: Hello. Thank you for taking my call. Couple of questions. Do you have a percentage breakdown for the origin of tomatoes consumed in the US for the month of April and May? And I have a follow up.

David Acheson: This is David Acheson to clarify. So you're asking in the months of April what percentage come from what growing area?

Louise Schiavone: Right.

David Acheson: (Okay). I personally do not have those numbers in front of me. I'm looking to my other colleagues here. Jack, speak up.

John Guzewich: This is Jack Guzewich with FDA. You can get that information from the US Department of Agriculture Economic Research Service.

Louise Schiavone: Okay. So would they also -- do you not have the answer to this question -- of the percentage of tomatoes not yet cleared, how much is from Mexico and how much is from Florida?

David Acheson: You're talking about at the production - the time the outbreak was going on or what's being produced now?

Louise Schiavone: Yes, what you're looking at as possible culprits in the salmonella outbreak.

David Acheson: Yes. Well, you know, I - again I do not have those specific numbers in front of me and I'm - I don't know whether any of my colleagues do. But I think the vast majority of tomatoes that were in the - in national distribution at that time -- that's my understanding; and please, Jack, correct me if I'm wrong here -- were being produced in one of those two places at the time the outbreak was going on. They were very likely from Florida or Mexico.

Louise Schiavone: All right. Then can I ask you a follow up for something that you probably (will) be able to answer?

David Acheson: Sure.

Louise Schiavone: Do you have investigators on any farms or in any growing area anywhere? I mean given that you believe that the predominance of the tomatoes in the supply chain for that period of time were from Mexico and Florida, do you have investigators on the ground any place in Mexico or Florida?

David Acheson: We have not sent investigators into any farms yet because we don't know where to send them. Where - what our investigators are doing right now is they are visiting the suppliers, the distributors, the importers, to get the records that we need to put a nail into the trace back. So that's what our investigators are doing.

So when you see FDA investigators out as part of this outbreak, they're not operating in places where we think the contamination may have started. They're operating in the areas where the distribution records are.

Louise Schiavone: So do you think that there's only one source of this outbreak, or is it possible that there are two different places? And could they potentially be, for instance, one in Mexico and one in Florida that are accounting for the salmonella outbreak?

David Acheson: Well one thing is - you learn in science is never to say never, but based on probabilities, it's extremely unlikely that the same genetic fingerprint would have come from two places at the same time. So all the precedent would indicate that this has come from a single geographic region. .

Louise Schiavone: Thank you. Thank you.

Michael Herndon: Okay. Thanks, Louise. Next question please.

Coordinator: Your next question comes from John Wilkerson, FDA Week. Your line is open.

John Wilkerson: Thank you. Some of the companies that pulled tomatoes such as McDonald's and Wal-Mart, they have their own safety certification program. Has FDA lost any confidence in relying on their parties for such safety audits?

David Acheson: At this point FDA doesn't rely on third parties for safety audits. FDA does - we do our own testing in our own labs as necessary. The only time that outside labs are used are in the context of importer (unintelligible), which is not what this is about. So we are not part of how fast food service chains do their own certification and testing programs.

John Wilkerson: But it wasn't third party certification part of the food protection plan at least for processing facilities?

David Acheson: It is. Yes. Voluntary certification is part of the food protection program. And as you very aptly point out, to make that work we have to be certain that the testing, the inspections, and the program meets our standards. That is something that we will need to do in the future if we're going to use voluntary certification or third party inspections.

We don't do that at this point, so it's a matter of what are we doing now. We don't use that data. We have talked about using in the future. And if we did, you're absolutely right -- we would need to make sure that those systems worked.

John Wilkerson: Thank you.



Michael Herndon: Thanks John. Next question please.

Coordinator: Your next question comes from Erica Nelson, Inside US Trade. Your line is open.

Erica Nelson: Yes, hello. Thank you. My question is if you don't have any people on the farms in Mexico, what is your status of investigation in that country, and have you at all responded to the Mexican government request for a speedy process for this investigation, and how are you working with them?

David Acheson: Well I'll give you a first answer and then I'll ask Matthew Eckel to follow up who's from our Office of International Programs.

We don't have inspectors/investigators down on farms in Mexico because at this point they haven't been specifically implicated. We have been in discussions with the Mexico government, as I have said before, and I'll ask Matthew to provide you a little bit more insight into how that works.

Matthew Eckel: Sure. We actually have communicated a lot with our foreign counterparts in Mexico, both through emails and phone calls and in face to face meetings as well. And we have in fact asked them for some assistance in this, asked them for some information about distribution down there.

They've obviously asked us for the information that we have up here, and we shared that with them. So we feel as though we're in a good place of collaborating with them to get more information and try to solve this more quickly.

Erica Nelson: And do you have any sense of a timeline of how long this will take, and are there any other foreign governments that you're also working with right now or sort of looking at as part of your investigation?

Matthew Eckel: With regard to the timing, I'd - I'll leave that to David, but we are providing information to our Canadian counterparts who are also interested in this.

David Acheson: Let me just address timing. The short answer is we don't know. We won't know for sure until we get there. But as I've said before, I'm still confident that we will get to the point where we will be definitively able to say a geographic region. I'm not certain we will, but I'm confident based on the people at FDA working on this and the data that we're getting that we will be able to get that far.

But it's certainly beyond my ability to see next day or two as to whether we're going to be there that quickly. It's the complexity of these things. And you can be almost there and something falls apart, and then you have to start over. And that's happened to us a number of times.

Michael Herndon: Okay, Erica. Thank you. Next question please.

Coordinator: Your next question comes from John Rockoff, Baltimore Sun. You may ask your question.

John Rockoff: Thanks. I'm just a little confused about FDA's posture on this. This wasn't a recall. It was a warning. What is a warning?

David Acheson: You're right. It wasn't a recall because we haven't identified a particular product (unintelligible) request voluntary recall. What we have done is to put out consumer advice -- consumer messages -- so the consumers know what

kinds of tomatoes are safe to eat and know what kinds of tomatoes that they shouldn't eat. So that's essentially our approach here.

There is nothing to recall yet because we don't know the source. Is that - do you follow that?

John Rockoff: Yes. I mean I guess my question is what sort of legal effect does that have? I mean could growers and seller keep, you know, selling tomatoes?

David Acheson: Well yes. They - and they are. But the - we hope that they're growing and selling tomatoes that are part of the exclusion, but there is no legal requirements for them to do that.

We - I mean our (tools) essentially are do we have anything to seize if we see that there's a problem. And we know that there is. And right now we don't because we haven't identified the particular source or a, you know, a timeframe of a harvesting batch of tomatoes that you would either (unintelligible) the recall around or seize. So there is no possibility of doing that because we don't know what the focus would be.

John Wilkerson: Yes, thanks. Appreciate it.

Michael Herndon: Next question please.

Coordinator: Your next question comes from Claire Cummings, KQED TV. Your line is open.

Claire Cummings: Thank you. I'm hearing reports out of - or seeing studies out of Europe that shows systemic uptake of salmonella in the roots of plants. And I'm wondering if the FDA is looking into whether the pathogen or the salmonella

is something that can be contaminated on the surface of the plant or in the plant itself. Are you looking into that?

David Acheson: Yes, to answer your question. And the answer's both. You certainly can get contamination on the surface. Obviously with the tomatoes grown outdoors, if there's salmonella in the environment or the dirt and it splashes up on the tomato, then you're going to have surface contamination.

And there are other ways in which salmonella can get inside the tomato as well. You're right, there is certainly data that's been put out in terms of - it's the same - we had the same conversations a while ago with spinach and whether E.coli can get up through the roots. And there is some basic science information to say in a certain environment salmonella can get up into the plant itself.

I don't know - I haven't seen data to say that with tomatoes it can actually get all the way from the root right into the fruit, but I - if you have seen papers to that effect, you're - I have no reason to disbelieve you. I (unintelligible)...

Claire Cummings: No it wasn't - sorry -- it wasn't the tomato plant that was studied for that. I think it was a (rapadotsis). But the point I'm trying to make is when you advise consumers, people think washing. You know, this is always a question for people.

David Acheson: Yes.

Claire Cummings: If I wash it will that help. If it's systemic, that won't help. Is the FDA going to put out any information for consumers on that?

David Acheson: We have already. And on these calls we've been saying - I've been saying that it's - number one it's important to continue to wash fresh produce. This is not a reason for consumers to say, "That really isn't going to help. It's inside anyway. Why bother?" That's a bad message and it's incorrect.

Yes, there are circumstances where we know that salmonella can get inside certain types of fresh produce. Tomatoes is one, cantaloupes is another, where under certain conditions - and the sorts of things that can do it is big temperature differences. If you've got a hot tomato or a hot cantaloupe - and one of the things that produces do to keep them fresh is to cool them quickly.

Claire Cummings: Oh.

David Acheson: And they put them in big vats of water called hydrocoolers, and you end up with a huge temperature difference between the hot cantaloupe or hot tomato and the cold water. And scientifically what happens is that the - some of the water from the cooler can get sucked inside the cantaloupes or inside the tomato. And if there's salmonella floating around in that water, it can go right in there that way.

So one of the questions would be here for our investigators, if they figure out there's a specific location, is how do you cool your tomatoes and was the chlorination adequate in those hydrocoolers. We're nowhere near that yet, but those are questions that we have asked before in these types of situations.

Claire Cummings: Right. I - just one quick follow up. I agree about - I'm a little concerned about mentioning this on the air because of the confusion it might cause for the public, but I also would like to know if FDA does find that the contamination that we're talking about here was systemic in these tomatoes, what then?

David Acheson: In terms of for consumers?

Claire Cummings: Yes.

David Acheson: Well, you know, that's one of the reasons why we're recognizing people don't eat these tomatoes, because we know that - we don't have confidence that simply washing them thoroughly or scrubbing them even, is going to remove any potential salmonella, because as we discussed, it could be inside.

So the consumer message around this particular outbreak is not to consume these tomatoes rather than to try to wash them. The basic consumer message around produce for a day-to-day basis is that if it's not already bought washed, make sure you wash it at home under plenty of cold running water. That...

David Acheson: ...message hasn't changed.

Claire Cummings: Thank you very much.

Michael Herndon: Thank you. Next question please.

Coordinator: Your next question comes from Elizabeth Lee, Atlanta Journal Constitution. Your line is open.

Elizabeth Lee: Hi. Thanks for taking my question. I wondered if you were far enough in the investigation to classify this as a sealed contamination or a packing house problem. And if not, is there a possibility that tomatoes from states that have been cleared might be sent to packing houses in areas that aren't cleared for processing and get contaminated still.

David Acheson: The first part of your question - the answer is we have not yet determined whether this was an on the farm problem or a packing house problem. Part of the criteria for exclusion is not just looking at where they're grown, but where they're packed. Jack Guzewich sitting next to me has done a lot of the analysis of the exclusion data. Jack, do you want to expand on that?

John Guzewich: Well we - in our investigations - if this investigation is like others and we can get back to a farm eventually, we will be asking all those questions -- could the contamination have happened in the field, could it have happened in the packing house? We aren't there yet. The problem we face is that we'll be there some time after the contamination occurred.

If it's like past experience, the field will no longer be in production. The process plant or the packing house will no longer be in production, so it has to be somewhat conjectural -- not actually seeing the process happen. We'll do our best to reconstruct what happened and try to understand as much as we can about the possible modes of contamination so industry can put interventions in place and so researchers can do additional research to better understand how this all happens.

David Acheson: But part of the question was also focused on could tomatoes from a new harvest area go to a packing house that was the source of the contamination. I think that was basically Elizabeth's point.

John Guzewich: But that is possible. That is possible. Yes. The - it's not uncommon for tomatoes to be trucked some distance to a different packing house and then processed in that packing house. That is possible.

Elizabeth Lee: Has the FDA taken steps to prevent that in this case, or is that a possibility in this outbreak?

David Acheson: (Unintelligible).

Elizabeth Lee: (I would say) for example North Florida.

David Acheson: Yes, the - certainly it's part of the exclusion. The question has been not only where are they grown but where are they packed to try to make sure that that doesn't happen.

John Guzewich: (Unintelligible) this is Jack Guzewich again. As far as Florida's concerned, we're working very closely with the Florida Department of Agriculture and Consumer Services. Our arrangement is with that agency, and we work closely with that agency year round and have a lot of trust in them, and they are assuring us that that is not happening.

They're assuring us that packing houses that were packing tomatoes during the time this outbreak would have occurred are no longer packing tomatoes. They're assuring us that tomatoes that are being harvested now are coming from areas that would not have been harvested during the time of the outbreak. So they're certifying every lot of tomatoes (unintelligible) Florida for that very purpose.

Elizabeth Lee: Okay. Thank you.

Michael Herndon: Okay. Next question please.

Coordinator: Your next question comes from Melinda Hemmelgarn at Columbia Daily Tribune. Your line is open.



Melinda Hemmelgarn: Yes. Thanks for offering these question and answer sessions. Since we know that salmonella originates from animal feces, does USDA or FDA have any mandatory regulations on the proximity of these fields to say (cafes) where we know there is a large pool of fecal material? And I have a follow up.

David Acheson: This is David Acheson. I'm not aware of any regulations by any federal authority -- and I can't speak to states -- that limits physically proximity of any mammalian species with growing areas. You're right, and this question has come up before in the context of E.coli 0157 being harbored in ruminants like cattle and the proximity to leafy green fields.

And part of the preventative controls that we would - we're really interested in trying to understand better is what might that look like. If you were to come up with what's a satisfactory distance, is it simply just a matter of distance or it obviously will be dependent on the drainage of the water, the topography of the land, and many other factors as opposed to just proximity itself.

But I've given you a long answer to a short question. The - I don't believe there's any federal regulations that address that.

Melinda Hemmelgarn: Wow, that's really significant. I've been following this for a long time, and I know that the American Public Health Association actually - it's you know, asked for a moratorium on these large animal (unintelligible) operations, and I wonder if this isn't one of the reasons.

But my second question has to do with who is really keeping tabs on the total cost of these operations? I'm not just talking about the loss of money from the sales of tomatoes, but I'm talking about - there's energy involved here, fossil fuels with regard to shipping tomatoes these long distances. Is there anybody who's really keeping tabs on these costs?

David Acheson: Adding it all up together, I don't know. Certainly FDA's focus is on protecting the public health and ensuring that we figure out what's going on here as quickly as possible and getting the right consumer messages out. We are - within FDA are not tracking the sorts of costs you're talking about. And I'm not aware that anybody else is.

Melinda Hemmelgarn: Thank you.

Michael Herndon: Thank you. Next question please.

Coordinator: Your next question comes from Amy Burkholder of CNN. Your line is open.

Amy Burkholder: Hi. Thank you. The first part of our question was addressed. We wanted to talk about whether this was a field problem or packing problem. But our follow up is since it's very unlikely the genetic fingerprint came from two different areas, if you can sort of rule Southern Florida out, does that rule Mexico in, and what happens then?

David Acheson: It increases probabilities.

Amy Burkholder: Yes.

David Acheson: You know, and I - you're right -- I did say it's very unlikely that the same genetic fingerprint would come from both areas. Part of a trace back investigation - the goal is to try to get a solid connection back to a certain farm. That's what we're trying to do through a series of invoices and records so you really are building a solid trail from the consumer all the way back to a field, based on solid records.

Sometimes you don't get that far, so there is always a possibility of, "Well that fizzled out. We didn't do it." So what's the other evidence that would lead you to believe that that one area over another is the most likely? And certainly if we can prove definitively that these tomatoes did not come from one particular growing region and there was another growing region that was supplying the bulk of the rest of the tomatoes, it would raise the likelihood that it came from the other one. It doesn't prove that it did.

So we're essentially just playing a games of what's the most likely. But at the end of the day what we're striving to do now is not to work on the basis of what's most likely but what's the actual true fact. But your basic question is yes, it is going to increase the likelihood that that was the source obviously.

Michael Herndon: Did you have a follow up?

Amy Burkholder: No that's I think it.

Michael Herndon: Okay, Thanks. (Gwennie) we'll only take a few more calls.

Coordinator: Thank you. Your next question comes from Tiffany Hsu, LA Times. Your line is open.

Tiffany Hsu: Great. Thanks for taking the time to answer our questions. Here's my first question -- there were times (of) frequent consumers (get the) FDA's warnings about, you know, the three varieties of tomatoes as a blanket statement to avoid all tomato varieties, which as we all know has caused the domestic tomato (unintelligible) and take a pretty expensive tumble.

And I mean it's not the first time; it happened with spinach. So my question is, does the FDA have any education measures or plans that curbs this are,

doesn't confuse consumers, and doesn't cause produce producers to take a hit every time (this outbreaks)?

David Acheson: (Yes I do). Yes this is David Acheson. I mean that's a really good question. We tried to learn from previous experiences. Spinach was different. It started in a very different way with a multi-state outbreak with a pathogen that was frankly a lot more concern from a clinical perspective than salmonella with E.coli 0157, and the information from patients at that time implicated multiple brands of spinach.

Tomatoes is different in that it was - we're dealing with salmonella, which is not as clinically significant as E.Coli 0157A:H7. We're dealing with no labels, no brands, so the messaging is slightly different. But we did try to learn from spinach and say, "Well what can we tell consumers about the tomatoes out there that are safe" -- the grape, the cherry, those grown on the vine which are not linked to the outbreak -- and then through this process of exclusion.

Part of the plans in the food protection plan is to ask those questions about consumer behaviors, risk messaging, how can we do it better, how can we find ways to get out to consumers, industry, retailers, in a way that is even more understandable.

And it's often difficult because consumers will just see salmonella, tomatoes, don't want to go there. They do not - they don't go beyond that. And right from the start here we've tried to provide more specific information, and that's one of the reasons we're doing these press calls. I'm constantly repeating what the consumer message is so that you all can help us get the word out that it isn't (full) tomatoes, because you're right -- the big aspects of the industry that are taking an economic hit because of this. And that's certainly not our goal.

Michael Herndon: Do you have a follow up Tiffany?

Tiffany Hsu: Yes I do. You were saying earlier that packing houses that were packing at the time of the outbreak are no longer packing (unintelligible) (whole lot of) packing. Sorry. But my understanding was that the outbreak is ongoing and that people could still be contracting salmonella from tomatoes that were produced and sold even after the initial news of the outbreak broke. Am I wrong?

David Acheson: Jack do you want to answer that?

John Guzewich: Yes, the - that's true. Well we - the CDC - Dr. Griffin may want to add to this as well, but the CDC has judged the outbreak is still ongoing based on information that Dr. Griffin can provide. But you need to realize - as far as their epidemiologic perspective. But you need to realize that tomatoes have a three or four week shelf life from the time they're harvested. And so if tomatoes were harvested back in late April and early May, some of those tomatoes have only recently gone beyond their shelf life.

When you add in the length of time it takes for a person to come down ill after they eat a tomato, the time it takes for that person to go and see a physician for a specimen to be collected, that specimen to be tested for salmonella, for it to get to a state lab and find Salmonella Saint Paul and so on, it can be easily two weeks and three weeks after the time of the initial exposure to the tomato before that case shows up in our detection system.

So that delay or lag in reporting system means that we still have appearances that the outbreak is ongoing. Dr. Griffin, you want to add to that?

Patricia Griffin: I think you said it exactly right. The last case of which we are aware of, the person became ill on June 1 and the incubation period is usually about 8 to 48 hours - can be a few days more - which means that if that person was one of the many who got sick from a tomato, probably ate the tomato at the end of May.

Now that tomato may be at the end of its shelf life or it may have been at the beginning of its shelf life. We don't know. So we're still watching to see whether or not the outbreak is ongoing. And because of the delays in the system that Jack told you about, it takes us a while to know whether the outbreak is over or not.

John Guzewich: Thanks, Dr. Griffin.

Tiffany Hsu: Great. Thank you.

Michael Herndon: (Gwennie) we only have time for two more questions.

Coordinator: Thank you. Your next question comes from (Eunice Ortiz), WNBC. Your line is open.

(Eunice Ortiz): Hi. Thanks for taking my call. I was calling - I just have one question and I'll make it quick. Thinking is there any way there could be a vaccine or something that could help treat it before it would happen for the salmonella or E.coli or anything like that, or is it a virus?

David Acheson: The short answer -- this is David Acheson and Dr. Griffin may well have some comment on this too -- the short answer is in theory yes, sure. You could potentially develop a vaccine against almost any microbe. It's not as simple as the answer I've just given. There are 2300 different types of salmonella. The

question would be do you develop a vaccine that covers all of them or just those that are most likely to cause illness?

So simply - the scientific answer is yes. You could most likely develop a vaccine. Whether it would be practical or cost effective is a whole other question.

Tiffany Hsu: Are you even working on - towards that or no?

David Acheson: FDA is not. If anybody would be doing that, that would be through the Offices of the National Institutes of Health or through academia.

Patricia Griffin: There are other bacteria for which - for example the Army has been working on vaccines for decades without getting ones that they are happy with. So although in theory it's quit possible that we could get a vaccine, there are many reasons that it has not been successful for many of the viral pathogens for which it's been tried. And we're not looking to that as a likely possibility in the near or near term future.

Tiffany Hsu: Okay. Thank you.

Michael Herndon: All right. Last question please.

Coordinator: Your last question comes for Jane Zhang, Wall Street Journal. Your line is open.

Jane Zhang: Oh, hi Dr. Acheson. You said most tomatoes on the market during the time of the outbreak came from Mexico and Florida. Which one has a bigger market share?

David Acheson: Yes you're right. I did say that, and I don't know. I don't know whether any of my colleagues know. I'm sure that's a piece of discoverable information, Jane. And if we can find it we'll get it to Mike Herndon, who can get it to you.

Jane Zhang: Thank you.

Michael Herndon: Did you have a follow up, Jane.

Jane Zhang: No. Thank you.

Michael Herndon: Okay. Well thank you ladies and gentlemen and this concludes today's media teleconference and thanks for your participation. Now we will continue to make every effort to provide you with updates regarding this outbreak, and we'll do that by either updating our respective websites or by holding a media teleconference if necessary -- if there's some new and breaking information this weekend.

So we really encourage you to check our website - FDA's website as well as CDC's website, and to also look out for any media advisories we might send out, okay? Also the - this replay will be available about an hour and - after this broadcast and will be available until next Tuesday. So if you have any follow up questions just don't hesitate to call the respective agencies. Thank you and have a great day.

Coordinator: This does conclude today's conference. Thank you for attending. You may disconnect at this time.

END





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## News & Events

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July 17, 2008

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### FDA Lifts Warning About Eating Certain Types of Tomatoes

The U.S. Food and Drug Administration is updating its warning to consumers nationwide concerning the outbreak of *Salmonella* Saintpaul.

After a lengthy investigation, the FDA has determined that fresh tomatoes now available in the domestic market are not associated with the current outbreak. As a result, the agency is removing its June 7 warning against eating certain types of red raw tomatoes.

The FDA, working with officials from the Centers for Disease Control and Prevention and state and local health departments, is continuing to follow epidemiological and other evidence showing that raw jalapeño and raw serrano peppers now available in the domestic market may be linked to illnesses in this outbreak. At this time, people in high risk populations, such as elderly persons, infants and people with impaired immune systems, should avoid eating raw jalapeño and raw serrano peppers.

According to the CDC, 1,220 persons infected with *Salmonella* Saintpaul with the same genetic fingerprint have been identified in 42 states, the District of Columbia and Canada.

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PRODUCE, LLC, JUNIPER TOMATO GROWERS,  
INC., JWM FARMS, LLC, FRED J. JACKSON,  
d/b/a JACKSON FARMS, FLOWERS FARM,  
LLC, PATTERSON FARM, INC., HOPKINS  
FARMS, LLC, MOBLEY GREENHOUSE  
INVESTMENTS, LLC, GREGORY ENTERPRISES,  
LLC, TOWNSEND BROTHERS FARMS, INC., and  
DALE MURRAY and GREG MURRAY, d/b/a MURRAY  
FARMS,

The Tomato Farmers,

vs.

Case No. \_\_\_\_\_

THE UNITED STATES,

Defendant.

**Exhibit 5 to Complaint  
Individual plaintiffs' losses**

HIGH HOPE FARMS (Florida and Georgia): 228.00 cultivated acres, with a total cultivated production of 410,400 boxes, having a market value as cultivated of \$7,387,200.00, less actual sales of \$2,642,590.00, for a total loss of \$4,744,610.00.

SK ENTERPRISES OF NORTH FLORIDA (Florida and Georgia): 102.70 cultivated acres, with a total cultivated production of 184,860 boxes, having a market value as cultivated of \$3,327,480.00, less actual sales of \$1,243,559.00, for a total loss of \$2,083,921.00.

(VIRGIL H.) BUTLER FARMS (Florida): 20.1 cultivated acres, with a total cultivated production of 40,200 boxes, having a market value as cultivated of \$723,600.00, less actual sales of \$155,824.25, for a total loss of \$567,775.75.

TWO FEATHERS FARMS (Georgia): 77.6 cultivated acres, with a total cultivated production of 150,078 boxes, having a market value as cultivated of \$2,701,404.00, less actual sales of \$735,344.90, for a total loss of \$1,966,059.10.

DAN JONES (Georgia): 48.5 cultivated acres, with a total cultivated production of 70,000 boxes, having a market value as cultivated of \$1,260,000.00, less actual sales of \$276,972.15, for a total loss of \$983,027.85.

CIRCLE C PRODUCE (Georgia): 158.00 cultivated acres, with a total cultivated production of 284,400 boxes, having a market value as cultivated of \$5,119,200.00, less actual sales of \$1,903,190.00, for a total loss of \$3,216,010.00.

JUNIPER TOMATO GROWERS (Florida): 79.0 cultivated acres, with a reduction in revenues on harvested tomatoes in the amount of \$897,800.00 (for red round tomatoes) and \$355,055.40 (for roma tomatoes), and a total loss of the value of unharvested tomatoes in the amount of \$179,462.50 (for red round tomatoes) and \$131,850.00 (for roma tomatoes), for a total loss of \$1,564,167.90.

JACKSON FARMS (Florida): 29.0 cultivated acres, with a reduction in revenues on harvested tomatoes in the amount of \$132,308.00 and a total loss of the value of unharvested tomatoes in the amount of \$526,781.00 (after deduction of \$2.50 per box for cost of harvesting and packaging), for a total loss of \$659,089.00.

HOPKINS FARMS (Georgia): 38.0 cultivated acres, with a reduction in revenues on harvested tomatoes (28,955 boxes) in the amount of \$376,415.00 and a total loss of the value of unharvested tomatoes (35,000 boxes) in the amount of \$525,000.00 (after deduction of \$3.00 per box for cost of harvesting and packaging), for a total loss of \$901,415.00.

MOBLEY GREENHOUSE INVESTMENTS (Georgia): 121.00 cultivated acres, with a total cultivated production of 217,800 boxes, having a market value as cultivated of \$3,920,400.00, less actual sales of \$1,503,780.00, for a total loss of \$2,416,620.00.

GREGORY ENTERPRISES (Florida): 34.0 cultivated acres, with a reduction in revenues on harvested tomatoes in the amount of \$605,744.00 and a total loss of the value of unharvested tomatoes in the amount of \$348,670.00 (after deduction of \$3.00 per box for cost of harvesting and packaging), for a total loss of \$954,414.00.

TOWNSEND BROTHERS FARMS (Florida): 75.3 cultivated acres, with a reduction in revenues on harvested tomatoes in the amount of \$739,200.00 and a total loss of unharvested tomatoes in an amount in excess of \$1,000,000.00; for a total loss in excess of \$1,739,200.00;

MURRAY FARMS (Georgia): 84.0 cultivated acres, with a reduction in revenues on harvested tomatoes (101,112 boxes) in the amount of \$1,011,120.00 and a total loss of the value of unharvested tomatoes (67,200 boxes) in the amount of \$1,008,000.00 (after deduction of \$3.00 per box for cost of harvesting and packaging), for a total loss of \$2,019,120.00.

QUALITY PRODUCE (Georgia): Approximately 48 cultivated acres, with a reduction in revenues on harvested tomatoes (20,000 boxes) in the amount of \$277,355.00 (the difference between pre-warning market value of \$320,000.00 and actual sales of \$42,645.50), and a total loss of the value of unharvested tomatoes (approximately 144,000 boxes) in the amount of \$2,250,000.00 (after deduction of \$3.00 per box for cost of harvesting and packaging), for a total loss of \$2,527,355.00.

FLOWERS FARM (South Carolina): 225 cultivated acres, with a reduction in revenues on harvested tomatoes (386,550 boxes) in the amount of \$4,445,325.00 (sold at \$4-5 per box, rather than the pre-warning value of \$16.00 per box), and a total loss of the value of unharvested tomatoes (144,450 boxes) in the amount of \$1,877,850.00 (at \$13.00 per box net after deduction of \$3.00 per box for cost of harvesting and packaging), for a total loss of \$6,323,175.00.

PATTERSON FARM (North Carolina): 287 cultivated acres, with 443,000 harvested boxes having a pre-warning value of \$16.00 per box value of \$7,088,000.00, 100,000 unharvested boxes having a pre-warning value of \$1,300,000.00 (after deduction of \$3.00 per box for cost of harvesting and packaging), less actual sales of \$3,693,000.00, for a total loss of \$4,695,000.00.

JWM FARMS (Georgia): 13.5 cultivated acres yielding 16,411 boxes, having a pre-warning value of \$18.00 per box, or \$295,398.00, less actual sales of \$195,678.40, for a total loss of \$99,719.60.